



# **SUPREME COURT OF MISSOURI**

## **en banc**

April 15, 2008

Effective July 1, 2008

IN RE: REVISIONS TO MAI-CIVIL

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## **ORDER**

1. Revisions of previously approved MAI-CIVIL Instructions, Notes on Use and Committee Comments as listed above, having been prepared by the Committee on Jury Instructions - Civil and reviewed by the Court, are hereby adopted and approved.

2. The Instructions, Notes on Use and Committee Comments revised as set forth in the specific exhibits attached hereto must be used on and after July 1, 2008, and may be used prior thereto; any such use shall not be presumed to be error.

3. It is further ordered that this order and the specific exhibits attached hereto shall be published in the South Western Reporter and the Journal of The Missouri Bar.

Day - to - Day

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LAURA DENVIR STITH  
Chief Justice

## **9.01 [2008 Revision] Eminent Domain - Damages - All Property Taken**

(Approved April 15, 2008; Effective July 1, 2008)

You must award defendant such sum as you believe [was]<sup>1</sup> is the fair market value of defendant's property [immediately before the taking on (*insert date of appropriation*)].<sup>1</sup> In determining the fair market value of defendant's property, you may consider evidence of the value of the property including comparable sales, capitalization of income, replacement cost less depreciation, the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

### Notes on Use (2008 Revision)

(Approved April 15, 2008; Effective July 1, 2008)

1. The bracketed terms shall be used where the appropriation takes place before trial. Where the appropriation does not take place until after trial, as in some condemnations by cities, the bracketed words should be omitted.

This instruction shall be used where defendant's total property is taken so there is no issue of damages or special benefits to the remaining property.

Committee Comment (2008 Revision)

(Approved April 15, 2008; Effective July 1, 2008)

This instruction incorporates the provisions of §523.001(1), RSMo, as required by §523.060.2, RSMo. Application of “heritage value” and “homestead taking” provisions of §523.001 (2) and (3), §523.039, and §523.061, RSMo, is a judicial function, not a jury function.

## **9.02 [2008 Revision] Eminent Domain - Damages - Part of Property Taken**

(Approved April 15, 2008; Effective July 1, 2008)

You must award defendant such sum as you believe [was]<sup>1</sup> is the difference between the fair market value of the entire property [immediately before the taking on (*insert date of appropriation*)]<sup>1</sup> and the fair market value of the remaining [burdened]<sup>2</sup> property [immediately after the taking].<sup>1</sup> In determining the fair market value of defendant's property, you may consider evidence of the value of the property including comparable sales, capitalization of income, replacement cost less depreciation, the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

### Notes on Use (2008 Revision)

(Approved April 15, 2008; Effective July 1, 2008)

1. The bracketed terms shall be used where the appropriation takes place before trial. Where the appropriation does not take place until after the trial, as in some condemnations by cities, the bracketed words should be omitted.

2. Select the appropriate term.

See MAI 9.05 for withdrawal of general benefits.

Where the condemning authority offers evidence that the property owner sustained no damage from the taking, MAI 9.04 must also be given.

Committee Comment (2008 Revision)

(Approved April 15, 2008; Effective July 1, 2008)

This instruction shall be used where only part of defendant's property is taken. It authorizes damages for the value of the property condemned and the resulting damage to the remaining property. This instruction is appropriate whether or not special benefits to defendant's remaining property are in issue.

This instruction incorporates the pertinent provisions of §523.001(1), RSMo, as required by §523.060.2, RSMo. Application of “heritage value” and “homestead taking” provisions of §523.001 (2) and (3), §523.039, and §523.061, RSMo, is a judicial function, not a jury function.

### **9.03 [2008 New] Eminent Domain - Burden of Proof**

(Approved April 15, 2008; Effective July 1, 2008)

The burden is on the defendant to cause you to believe that defendant has sustained damage and the amount thereof. In determining the amount of your verdict, you must consider only the evidence and the reasonable inferences derived from the evidence. If you do not believe certain evidence, then you cannot consider that evidence in arriving at the amount of your verdict.

Notes on Use (2008 New)

(Approved April 15, 2008; Effective July 1, 2008)

A burden of proof instruction must be given in every case. MAI 9.03 is to be used in all eminent domain cases.

Committee Comment (2008 New)

(Approved April 15, 2008; Effective July 1, 2008)

The Committee believes that in the usual eminent domain case the issues are sufficiently distinctive to have a special burden of proof instruction, MAI 9.03. In more complicated eminent domain cases in which there may be issues of special benefits, complete affirmative defenses, avoidance of affirmative defenses, etc., the general burden of proof instruction, MAI 3.01, should be used. The court should then exercise care in supervising arguments of counsel to ensure that such arguments are consistent with the applicable law. This approach in more complicated cases obviates the need for



modification to the burden of proof instruction referenced in *State Transp. Com'n. v. Buys*, 909 S.W.2d 735 (Mo. App.1995).

This burden of proof instruction replaces MAI 3.02.

**9.04 [2008 New] Eminent Domain - Verdict Directing - Where Authority Claims  
"No Damage" From Taking**

(Approved April 15, 2008; Effective July 1, 2008)

Your verdict must be for defendant if you believe that defendant has been damaged by either or both of the following:

1. The taking of the property [rights].<sup>1</sup>
2. The use[s] that plaintiff has the right to make of the property [rights]<sup>1</sup> taken.

\* [unless you believe defendant is not entitled to recover by reason of Instruction Number \_\_\_\_\_ (*here insert number of affirmative defense instruction*)].

**Notes on Use (2008 New)**

(Approved April 15, 2008; Effective July 1, 2008)

1. Use bracketed term where easements, etc., are taken rather than the fee.

This verdict directing instruction is to be used only in condemnation cases where the condemning authority offers evidence that the property owner sustained no damage from the taking.

This verdict directing instruction replaces MAI 31.05.

\*Add if affirmative defense is submitted.

## **9.05 [2008 New] Withdrawal Instructions - General Benefits - Eminent Domain**

(Approved April 15, 2008; Effective July 1, 2008)

In determining the value of defendant's remaining property, you must not consider any general benefit that is conferred upon all property within usable range of (*here describe the improvement that is the subject matter of the action; e.g., the proposed highway, park, etc.*).

### Notes on Use (2008 New)

(Approved April 15, 2008; Effective July 1, 2008)

This may be given as a separate instruction or as an addition to the general damage instruction, at the option of defendant. Evidence of general benefits should be excluded upon proper objection, but the withdrawal instruction should nevertheless be proper, because the jury would otherwise take them into consideration in determining fair market value.

If there is evidence of general detriments, they may be withdrawn in the same way.

If specific evidence of general benefits is improperly admitted, such evidence may be withdrawn by an instruction patterned after MAI 34.02. MAI 9.05 may be used in addition thereto.

While MAI 9.05 is called a "withdrawal" instruction, its use is not limited to withdrawing evidence that is accidentally or improperly admitted. It is intended, rather, to clarify what the jury is to consider in assessing damages. Instructions patterned after

MAI 34.02 are intended to withdraw a specific matter that might otherwise mislead the jury. MAI 9.05 may be given at the defendant's option while MAI 34.02 may be given only at the discretion of the trial judge.

This instruction replaces MAI 34.03.

## **9.06 [2008 Revision] Illustrations - Eminent Domain - All Property Taken**

(Approved April 15, 2008; Effective July 1, 2008)

John and Mary Jones were the owners of Blackacre, which was taken by the State on July 1, 1980. Commissioners were appointed and made their award of damages. Plaintiff and defendants filed timely exceptions to the Commissioners' award. The issue of damages was tried to a jury.

Instruction No. 1  
(Same as MAI 2.01)

Note: In condemnation cases, the defendant is first in the order of proof and the references to plaintiff and defendants in MAI 2.01 will be reversed. See MAI 2.01 Notes on Use.

Instruction No. 2  
(See MAI 2.03 (1980 New))

As you remember, the court gave you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3  
(See MAI 2.02 (1980 Revision))

In returning your verdict you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 4  
(See MAI 9.03 (2008 New))

The burden is on defendants to cause you to believe that they have sustained damage and the amount thereof. In determining the amount of your verdict, you must consider only the evidence and the reasonable inferences derived from the evidence. If you do not believe certain evidence, then you cannot consider that evidence in arriving at the amount of your verdict.

Instruction No. 5  
(See MAI 2.04 (1981 Revision))

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 6  
(See MAI 9.01 (2008 Revision))

You must award defendant such sum as you believe was the fair market value of defendant's property immediately before the taking on July 1, 1980. In determining the fair market value of defendants' property, you may consider evidence of the value of the property including comparable sales, capitalization of income, replacement cost less depreciation, the highest and best use to which the property reasonably may be applied or

adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

**VERDICT A**  
(See MAI 36.01 (1980 Revision — Modified))

We, the undersigned jurors, assess the damage of defendants at  
\$\_\_\_\_\_ (*stating the amount*).

Note: All jurors who agree to the above findings must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Committee Comment (2008 Revision)  
(Approved April 15, 2008; Effective July 1, 2008)

In this Illustration, there is only one verdict form; as a result, all instructions are included in one package. MAI 2.05 is not to be used when there is only one verdict form. See MAI 2.00.

This Illustration replaces Illustration 35.08.

**9.07 [2008 Revision] Illustrations - Eminent Domain - Part of Property Taken -  
Evidence of Damage to Remainder**

(Approved April 15, 2008; Effective July 1, 2008)

Ajax Super Market, Inc., owned a four-acre tract of land adjacent to Highway 54. To enable it to widen the highway, the State condemned two acres of Ajax's land nearest the highway. The taking occurred on July 1, 1980. The two acres taken had been used as a parking lot. Defendant's store building is on the remaining two acres. The right of access was not disturbed. The State made no contention of special benefits. Commissioners were appointed and made their award of damages. The parties filed timely exceptions to the Commissioners' award and the case was tried to a jury. Defendant, Ajax Super Market, Inc., offered evidence of the value of the entire tract before the taking and of the value of the remainder after the taking. Defendant's witnesses took into account the severance damage to the two acres which remained after the taking because adequate parking was no longer available for super market purposes.

Instruction No. 1  
(Same as MAI 2.01)

Note: In condemnation cases, the defendant is first in the order of proof and the references to plaintiff and defendant in MAI 2.01 will be reversed. See MAI 2.01 Notes on Use.

Instruction No. 2  
(See MAI 2.03 (1980 New))

As you remember, the court gave you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you.



You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3  
(See MAI 2.02 (1980 Revision))

In returning your verdict you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 4  
(See MAI 9.03 (2008 New))

The burden is on defendant to cause you to believe that it has sustained damage and the amount thereof. In determining the amount of your verdict, you must consider only the evidence and the reasonable inferences derived from the evidence. If you do not believe certain evidence, then you cannot consider that evidence in arriving at the amount of your verdict.

Instruction No. 5  
(See MAI 2.04 (1981 Revision))

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 6  
(See MAI 9.02 (2008 Revision))

You must award defendant such sum as you believe was the difference between the fair market value of the entire property immediately before the taking on July 1, 1980, and the fair market value of the remaining property immediately after the taking. In determining the fair market value of defendant's property, you may consider evidence of the value of the property including comparable sales, capitalization of income, replacement cost less depreciation, the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

Verdict A  
(See MAI 36.01 (1980 Revision — Modified))

We, the undersigned jurors, assess the damages of defendant at  
\$\_\_\_\_\_ (*stating the amount*).

Note: All jurors who agree to the above findings must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Committee Comment (2008 Revision)

(Approved April 15, 2008; Effective July 1, 2008)

In this illustration, there is only one verdict form; as a result, all instructions are included in one package. MAI 2.05 is not to be used when there is only one verdict form. See MAI 2.00.

When the condemning authority has evidence from which the jury can find that the property owner sustained no damage from the taking, MAI 9.04 must be used and the verdict form used in this Illustration should be modified to require a finding in favor of plaintiff or defendant.

This Illustration replaces Illustration 35.09.

## **16.02 [2008 Revision] Definition - Fair Market Value**

(Approved April 15, 2008; Effective July 1, 2008)

The phrase “fair market value” as used in this [these] instruction[s] means the price that the property in question would bring when offered for sale by one willing but not obliged to sell it and when bought by one willing or desirous to purchase it but who is not compelled to do so.

Notes on Use (2008 Revision)

(Approved April 15, 2008; Effective July 1, 2008)

When the phrase "fair market value" is used in an eminent domain case, see MAI 9.01 and 9.02. In other types of cases involving the fair market value of personal property, the above definition must be used. See MAI 4.02, 4.10 and 4.17.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

### **3.02 [2008 Withdrawn] Burden of Proof - Eminent Domain**

(Approved April 15, 2008; Effective July 1, 2008)

(MAI 3.02 (1981 Revision) and its related Notes on Use and Committee Comment have been withdrawn. All instructions and Illustrations relating to Eminent Domain have been collected in Chapter 9 of MAI - Civil. MAI 3.02 has been replaced by MAI 9.03 (2008 New)).

### **31.05 [2008 Withdrawn] Verdict Directing - Eminent Domain**

(Approved April 15, 2008; Effective July 1, 2008)

(MAI 31.05 (1981 Revision) and its related Notes on Use have been withdrawn.

All instructions and illustrations relating to Eminent Domain have been collected in

Chapter 9 of MAI - Civil. MAI 31.05 has been replaced by MAI 9.04 (2008 New).)

### **34.03 [2008 Withdrawn] Withdrawal Instructions - General Benefits - Eminent Domain**

(Approved April 15, 2008; Effective July 1, 2008)

(MAI 34.03 and its related Notes on Use have been withdrawn. All instructions and illustrations related to Eminent Domain have been collected in Chapter 9 of MAI - Civil. MAI 34.03 has been replaced by MAI 9.05 (2008 New).)

### **35.08 [2008 Withdrawn] Illustrations - Eminent Domain - All Property Taken**

(Approved April 15, 2008; Effective July 1, 2008)

(Illustration 35.08 has been withdrawn. All instructions and Illustrations related to Eminent Domain have been collected in Chapter 9 of MAI - Civil. Illustration 35.08 has been replaced by Illustration 9.06 (2008 New).)



**35.09 [2008 Withdrawn] Illustrations - Eminent Domain - Part of Property Taken -  
Evidence of Damage to Remainder**

(Approved April 15, 2008; Effective July 1, 2008)

(Illustration 35.09 has been withdrawn. All instructions and Illustrations related to Eminent Domain have been collected in Chapter 9 of MAI - Civil. Illustration 35.09 has been replaced by Illustration 9.07 (2008 New).)